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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 183

THE ASSOCIATED PRESS,

Petitioner,

v.

TAFT-INGALLS CORPORATION, formerly known as THE CINCINNATI TIMES-STAR COMPANY, an Ohio Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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September 9, 1965

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The Associated Press' ("AP's") Petition for a Writ of Certiorari in No. 183 establishes, among other things, that respondent ("Times-Star") willingly entered into a contract with AP in 1948 whereby it agreed to take AP's basic news service, transmitted over three wires; that there was nothing illegal about the contract; that this remains so, as between the parties to the contract, even if it be assumed, *arguendo,* that AP had an illegal policy or practice of requiring member newspapers to subscribe to the basic service; and that, in any event, the three-wire service was a single, inseparable "product".

In attempting to challenge these conclusions, Times-Star ignores much of the evidence and misinterprets or misapplies various authorities in the field of tie-in practices. Only a few of these errors, in our opinion, warrant rebuttal.

ARGUMENT

1. No Illegal Tie-in Can Exist Between a Willing "Buyer" and a Willing "Seller".

As we pointed out in the Petition (p. 15), all this Court held to be illegal in *United States* v. *Paramount Pictures,* 334 U. S. 131, 159, was a *"refusal** to license one or more copyrights unless another copyright is accepted." A "refusal" contemplates the rejection of a position taken by another,** and not, as here, a meeting of minds between a willing buyer and a willing seller.

Times-Star contends that it can willingly agree in 1948 to take AP's basic service and, nine years later, with impunity breach its contract by demanding only part of the basic service. Its contention, in the context of the *Paramount* case, on which it purports to rely (Br., p. 9), would mean that a motion picture exhibitor could, today, willingly enter into a written contract to take 50 films and, years later, in breach of his contract, with impunity inform the distributor that he wants only 10.

As between the parties to the contract, a specific demand for less than what is offered generally is required. Thus, in *United States* v. *Loew's, Incorporated,* S. D. N. Y., 189 F. Supp. 373 (1960), *aff'd on merits, remanded for further*

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*Emphasis supplied.

**Webster's Third New International Dictionary (1961), "refusal"; The Oxford English Dictionary (1933), "refusal".

consideration of decree, 371 U. S. 38, relied on by Times-Star (Br., p. 11), Judge Dawson stated (p. 380-1):

> "But, is a *demand** a prerequisite to a finding of refusal? There may be an inference that it is in certain opinions in treble-damage actions. J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp., 2 Cir., 1954, 212 F. 2d 840, 845; Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 2 Cir., 1959, 268 F. 2d 246, 251, certiorari denied 1959, 361 U. S. 885, 80 S. Ct. 156, 4 L. Ed. 2d 121; Milwaukee Towne Corp. v. Loew's Inc., 7 Cir., 1951, 190 F. 2d 561, 568, certiorari denied 1952, 342 U. S. 909, 72 S. Ct. 303, 96 L. Ed. 680. This may well be a rule of law applicable as to the allowance of damages in a private anti-trust action, but it can hardly be laid down as a rule of law in an action in which the Government is seeking an injunction. Furthermore, as Judge Washington said in the Royster case, 'Perhaps on occasion circumstances may excuse the lack of demand.' 268 F. 2d at page 251. The Court does not believe that a specific 'demand' is a necessary prerequisite of a finding of refusal if there is sufficient other evidence to justify a finding that there was a refusal on the part of the distributor to deal except on a block-booked basis."

AP's basic service was established with the unanimous approval of all members involved (R. 162a). Throughout AP's history since the addition of the D wire in 1934 or 1935, no member, other than Times-Star, has ever asked for less than the basic service (R. 163a-164a). Indeed, there is no evidence that any member ever asked for less

*Emphasis the court's.

prior to 1934. Plainly, it was the conclusion of all involved that a basically minimum service was being supplied. No circumstances appear which would warrant relaxation of the rule that, as between the parties to the contract, a specific demand for less than what is offered is required.

In any event, whether a specific demand is essential in private actions does not require a decision in this case, where the member affirmatively wanted the entire service and agreed to take it. Under these circumstances, there can be no valid claim that AP refused to furnish less than the entire package. *United States* v. *Loew's, Incorporated, supra,* at p. 394 (see Petition, p. 16).

Times-Star proves nothing to the contrary by citing *McElhenney Co.* v. *Western Auto Supply Company,* 4 Cir., 269 F. 2d 332 (1959) (Br., p. 9-10). Chief Judge Soboloff was speaking of agreements not to deal in the goods of another when he said that it makes no difference whether the agreement is "voluntary or is imposed by coercion . . ." (p. 338). Obviously so, in the case of agreements of that character. But in the case of tie-ins, the critical inquiry on which the question of legality turns, as between the parties, is whether the agreement is "voluntary or is imposed by coercion."*

Times-Star seeks to cast the 1948 contract in an unfavorable light by criticizing the two year termination clause (Br., p. 11-12). It is true that the contract provides that "it shall continue thereafter until terminated by the Member upon two years' notice . . ." (P. Ex. 4, R. 391a, 65a). The evidence shows that AP, in order to render service to its members, must enter into long-term commitments (R. 16b). For example, AP's labor contracts are of two or three

*The same comment is applicable to *Simpson* v. *Union Oil Co.,* 377 U. S. 13, involving a resale price fixing contract illegal whether entered into voluntarily or under compulsion (Br., p. 14).

years' duration (R. 16b, 67b-68b). Moreover, some of the leases for office space in various places are for many years' duration (R. 16b, 70b). Except for the trivial amount of $43 per week, AP has no expense saving on these or other items of cost by virtue of the withdrawal of a member (R. 15b-16b, 18b-20b, 22b). Therefore, the agreement, requiring a two year notice of termination, is plainly reasonable in every respect.

2. The Validity of the Contract Between the Parties Is Not Affected Even If an Illegal Tie-in Policy Be Assumed Arguendo.

In its Petition, AP relies on *Kelly* v. *Kosuga,* 358 U. S. 516, to demonstrate that a valid contract existed between Times-Star, a willing "buyer", and AP and that the validity of the contract would not be affected even if it be assumed, arguendo, that a collateral AP policy or practice illegally required metropolitan newspapers to subscribe to a basic service transmitted by means of three facilities (Petition, p. 17-19).

The true significance of *Kelly,* we respectfully submit, is that the purchaser was required to pay for onions he never received, and obviously did not want, even though part of the very contract was assumed to be illegal under the antitrust laws (Petition, p. 17-19). The rule of *Kelly* applies *a fortiori* here, where the contract itself is legal in every respect and inquiry must be made into collateral circumstances to determine whether an illegal policy or practice existed.

Times-Star emphasizes that *Kelly* reiterated the principle that the Court will not enforce "the precise conduct made unlawful by the [Sherman] Act" (Br., p. 15). But it never makes clear what "precise [unlawful] conduct" would be enforced if AP's contract with Times-Star is sustained. Plainly, we submit, the "precise conduct" is not

the 1948 agreement to supply Times-Star the service it wanted. There is nothing illegal about that. Nor is it AP's refusal in 1957 to acquiesce in Times-Star's breach of its 1948 contract. There is nothing illegal about that. Nor would enforcement of the 1948 contract require enforcement of any assumed AP practice of illegal tie-ins. If there is any such practice, and if it is illegal, which of course we deny, it is subject to injunction in an appropriate case or to an action by one who did not willingly agree to take the service.

3. AP's Basic Service Is Not Separable.

One must turn to the Petition to review the extensive evidence demonstrating that AP's basic service is inseparable (Petition, p. 3-8, 11-14, 20-22). Reference to such evidence is not to be found in Times-Star's Brief. Rather, Times-Star contents itself with sweeping generalizations such as, for example, (1) "Each of the wire circuits of AP is functionally and operationally separate and distinct"; (2) AP's leased wire news service for Times-Star "included the Kentucky State wire circuit"; (3) the three circuits "connect different cities"; and (4) the Kentucky wire was "arbitrarily dropped in the proposal made to Scripps" (Br., p. 3, 5, 6). We think the Petition is sufficient to demonstrate that these generalizations do not fully or accurately reflect the record facts.

We further submit that the so-called criteria of separability utilized in *United States* v. *Jerrold Electronics Corporation,* E. D. Pa., 187 F. Supp. 545, 559 (1960), *aff'd* 365 U. S. 567, and referred to by Times-Star on pages 16 and 17 of its Brief, were improperly applied by the majority of the Court of Appeals below to the facts of this case.

Unlike *Jerrold,* it is not clear from the evidence here that AP's competitor, UPI, furnished each of its wires

for separate prices (Petition, p. 14; Appendix A, p. 38a; D. Ex. 16, R. 453a, 120a). Moreover, as we have shown, no valid comparison can be drawn between UPI, a profit making corporation, and AP, a membership corporation (Petition, p. 14).

Unlike *Jerrold,* the issue here is not whether each news dispatch is a separate service, but whether the wires in the basic service are distinct. The variety of dispatches transmitted by each wire supports the conclusion that the basic service is inseparable (Petition, p. 6-7).

Unlike *Jerrold,* AP does not charge separately for each wire in the basic service (Petition, p. 7). Indeed, it would be difficult, if not impossible, to segregate costs among the three wires (Petition, p. 7-8, 11-12; see also AP's Brief in No. 185). Moreover, unlike the cable and antenna in *Jerrold,* AP's Kentucky wire and supplemental wires were not "sold" as part of the basic service (Petition, p. 12-13).

Times-Star suggests (Br., p. 16) that the "rationale" of *Times-Picayune* v. *United States,* 345 U. S. 594, was weakened by *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1. As the Court of Appeals below conceded, however, the portion of the *Times-Picayune* rationale which might be considered "weakened" is that relating to market dominance, and not separability (Petition, Appendix A p. 13a). Separability is always a fact issue, and we do not dispute that the decision in *Times-Picayune* was confined to the narrow record before the Court. However, we do assert that if the record facts in *Times-Picayune* establish inseparability of product, *a fortiori* the facts here establish inseparability of service (Petition, p. 21).

We fail to see what comfort Times-Star acquires by contending that the decision in *Dehydrating Process Co.* v. *A. O. Smith Corp.,* 1 Cir., 292 F. 2d 653 (1961), *cert. den.,* 368 U. S. 931, was based on "sound business reasons" rather than inseparability of product (Br., p. 16). As we

said in the Petition, sound business reasons or "substantial hardship" in the event of a severance of AP's basic service support AP's position that the decision of the Court of Appeals was in error (Petition, p. 22).

AP is a membership corportaion. The members consented to its method of gathering and distributing the news. A fair determination of the cost of any single wire in the basic service would be difficult, if not impossible. AP's method of recovering its operating expenses by assessments based on population is, on the other hand, a fair one. News of any character is constantly spilling over on each of the wires constituting the basic service. Failure of one newspaper to pay its assessment on the same basis as the other members would saddle the remaining members with an additional assessment (Petition, p. 3, 5-8, 9, 21-22). These and other factors plainly point to the conclusion that the basic service is a single, distinct product. Equally, however, they point to the conclusion that justifiable business reasons support the conclusion that the basic service may be sold as a unit, whether or not the three wires are regarded as physically distinct services.

CONCLUSION

For the reasons stated in the Petition, and above, the petition for a writ of certiorari should be granted.

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